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No.—

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A school district in the state of New York makes its facilities available for community use for "civic, social, and recreational" purposes but forbids use by any group "for religious purposes." The pastor of a local church applied for permission to use school facilities to show a film series about family issues. The school district has denied permission because of the religious content of the film series.

1. Did the Second Circuit err in holding, in conflict with the First, Third, and Fifth Circuits, that a public school district may deny equal access to the use of its facilities during non-school hours solely on the basis of the religious content of the would-be user's speech, without violating with the First Amendment?

2. Did the Second Circuit err in holding, in conflict with the First, Third, Fourth, and Fifth Circuits, that public school facilities that are available for social, civic, and recreational use by the general public are not designated public fora for purposes of the right to free speech under the First Amendment?

3. Is the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech unconstitutional regardless of whether the facilities are "designated public fora," "limited public fora," or "nonpublic fora" for purposes of the right to free speech under the First Amendment?

4. Does the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech violate the Establishment Clause of the First Amendment?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.*

*Petitioner Lamb's Chapel is a not-for-profit corporation. It has no parent company or subsidiaries.

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DECISIONS BELOW

The decision of the court of appeals is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992). The decision of the district court granting summary judgment is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991). The prior decision of the district court denying a preliminary in-

junction is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment in this case on March 18, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The New York statute governing community use of public school facilities, N.Y. Educ. Law § 414 (McKinney 1988), is set forth in Appendix D (App. 52a).

The regulations of the Center Moriches Union Free School District governing community use of public school facilities are set forth in Appendix E (App. 56a).

STATEMENT OF THE CASE

This is a case about official content- and viewpoint-based censorship of religious speech from a forum opened for general social, civic, and recreational use by the public.

Respondent Center Moriches Union Free School District makes its physical facilities available, during non-school hours, for social, civic, recreational, and other activities by members of the local community, but explicitly forbids use "by any group for religious purposes." Petitioners, a church and its pastor, have applied to use Center Moriches school facilities in order to show a film series, "Turn Your Heart Toward Home," by Dr. James Dobson. The school district has denied permission solely because of the religious content of the film series.

In the present action, petitioners seek injunctive and declaratory relief, under 42 U.S.C. § 1983, against the denial of their right to access, on equal terms with other members of the community, to the use of public school facilities.

A. Statement of Facts

Respondent Center Moriches Union Free School District (hereinafter "Center Moriches") is a subdivision of the State of New York duly organized to provide public education in Suffolk County. Center Moriches controls the use of various public school facilities including auditoriums, cafeterias and other meeting rooms.

New York state law authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" provided that "such meetings, entertainment and uses shall be non-

exclusive and shall be open to the general public." N.Y. Educ. Law § 414(1)(c) (McKinney 1988 & Supp. 1992) (App. 52a).

Pursuant to this statute, Center Moriches has adopted official rules governing community use of school district facilities. Rules and Regulations for Community Use of School Facilities [hereinafter, "Rules & Regs."] (App. 56a). These rules explicitly authorize permits for, *inter alia*, "social, civic, or recreational use" when "non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event." Rules & Regs. #10 (App. 57a). Center Moriches has regularly granted permission to a multitude of groups to conduct activities in school facilities,[1] including the following (taken from the years 1987 through 1990):

Manorville Humane Society
Holiday Beach Property Owners Assoc.
Moriches Bay Civic Association, Inc.
Unkechaug Dance Group Cultural Program
Moriches Choral Society
H.E.L.P. (Helping Every Living Person) Meeting
Chamber of Commerce Annual Duck Race
Center Moriches Co-op Nursery School Quilting Project
PK Dance School Recital
Committee on the Busing Vote
Center Moriches Public Library
Moriches Pa-Qua-Tuck Squaws Chinese Auction
Hampton Council of Churches/Family Counseling Services Billy Taylor Concert

[1] The heavy, ongoing use of school facilities for a potpourri of activities by both school groups and outside organizations is plain from the record. During the week of Dec. 5-11, 1988, for example, there were twenty entries on the Center Moriches calendar for approved and scheduled uses of school district facilities. Plaintiffs' Ex. 3. This week was by no means atypical. *See id.* (March 13-19, 1989—18 uses); Plaintiffs' Ex. 4 (Nov. 13-19, 1989—23 uses; Feb. 5-11, 1990—26 uses).

Moriches Bay Power Squadron Boating Safety Instruction
Moriches Youth Organization
St. John the Evangelist Church Track Program K-8
Music Department/Salvation Army Dinner and Concert
Center Moriches PTA
Southern Harmonizers Gospel Singing
Brownie Troop # 1338
Brookhaven Kennel Club Dog Obedience and Breed Handling Classes

Plaintiffs' Exs. 4, 9a, 11a, 12a, 14, 20-23.

The official rules of Center Moriches, however, expressly forbid use of school premises "by any group for religious purposes." Rules & Regs., #7 (App. 57a).

Petitioner John Steigerwald is the pastor of an Evangelical Christian Church, petitioner Lamb's Chapel (App. 17a).

Pastor Steigerwald applied on two separate occasions for permission to use school facilities to show a film series about family issues. Each time Center Moriches rejected his application because of the religious content of the film.[2]

Pastor Steigerwald wrote to Mrs. Alice M. Schoener, business manager and district clerk of Center Moriches (Tr. 60), on Dec. 18, 1988, enclosing an application for

[2] Pastor Steigerwald had previously requested use of school facilities to conduct Sunday morning services during 1989. Plaintiffs' Ex, 5a. On the application Pastor Steigerwald indicated his willingness to abide by the Center Moriches Rules and Regulations "excluding #7" (the ban on use for religious purposes). *Id.* A school district official replied with a letter dated Nov. 23, 1988, stating that "in accordance with No. 7 of our currently existing rules and regulations, your request must be denied (see New York Education Law Section 414, which governs the board's position)." Plaintiffs' Ex. 5b. Pastor Steigerwald has not renewed his request to use school facilities on an ongoing basis for Sunday services, and his request for such use is not before this Court.

the use of school facilities for the presentation of a film series featuring Dr. James Dobson.[3] Plaintiffs' Ex. 6a. The series was to run in five parts, one evening each week for five weeks. *Id.* On the application form, Pastor Steigerwald noted that the purpose of the film presentation was "Family emphasis" and "to share some prac-[tic]al insight about the family." *Id.* Mrs. Schoener replied, in a letter dated Jan. 18, 1989, as follows:

> [W]e are bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of a facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> . . . .
>
> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film) . . . .

Plaintiffs' Ex. 6b.

On Feb. 2, 1989, Pastor Steigerwald responded to Mrs. Schoener's request for additional information by sending a brochure describing the planned film series, "Turn Your Heart Toward Home." Plaintiffs' Exs. 6c, 6d. Mrs. Schoener replied, on Feb. 8, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." ~~Plaintiffs' Ex. 6d~~.

Pastor Steigerwald submitted another request on Oct. 23, 1989, once more seeking the use of school facilities for the Dr. Dobson film series. Plaintiffs' Ex. 7a. In response,

[3] Plaintiffs' Exhibit 6d includes a brochure describing the film series. The brochure identifies James C. Dobson, Ph.D., as a licensed psychologist, teacher, author of nine best-selling books, President of Focus on the Family, and host of a daily half-hour radio program broadcast across the country.

Mrs. Schoener wrote on Nov. 15, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 7b.

Pastor Steigerwald and Lamb's Chapel would be eligible, in general, to use Center Moriches facilities so long as their activities did not have "religious purposes." Mrs. Schoener testified, for example, that Pastor Steigerwald and Lamb's Chapel would be allowed to use school facilities for athletic purposes. Tr. 71. The reason Center Moriches has refused Pastor Steigerwald and Lamb's Chapel access to public school facilities to show a film series on families is the religious content of petitioners' planned film series. Plaintiffs' Exs. 6b, 6d, 7b.

B. Course of Proceedings

Lamb's Chapel and John Steigerwald (collectively, "Lamb's Chapel") filed suit in federal district court on February 9, 1990, naming as defendants both Center Moriches Union Free School District and Louise Tramontano in her official capacity as president of the Board of Education for Center Moriches Schools (collectively, "Center Moriches"). Lamb's Chapel requested an injunction requiring Center Moriches to let Lamb's Chapel use school facilities to show the planned Dr. Dobson film series and forbidding Center Moriches from discriminating against religious groups "because of the religious content . . . of their speech." Complaint ¶ 36. Lamb's Chapel also sought a declaration that Center Moriches had created an "open forum," had engaged in unconstitutional content discrimination against Lamb's Chapel's speech and religious beliefs, had violated Lamb's Chapel's federal constitutional rights to free speech, freedom of assembly, equal protection, and free exercise of religion, and had violated the Establishment Clause of the First Amendment. *Id.* ¶ 37.

Center Moriches responded by relying upon section 414 of the New York Educaton Law. Center Moriches alleged

that this statute precludes the use of school district premises for religious purposes,[4] Answer ¶ 39, and that the school district's official rules governing the use of Center Moriches facilities (including the ban on uses for religious purposes) were in conformity with section 414, *id.* ¶¶ 36, 54. Center Moriches denied that it had created an open forum and maintained that its Board of Education "controlled" the use of school facilities. *Id.* ¶¶ 42, 45. Finally, Center Moriches claimed that it had a "compelling interest" in protecting elementary and secondary students from "proselytizing religious ideas of various religious groups and entities," and that section 414 furthered that government interest. *Id.* ¶¶ 48, 49.

On May 18, 1990, the U.S. District Court for the Eastern District of New York denied Lamb's Chapel's motion for a preliminary injunction. *Lamb's Chapel v. Center Moriches Union Free School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990) (App. 35a).

Lamb's Chapel appealed from the denial of the preliminary injunction. At the suggestion of Staff Counsel for the Second Circuit, however, Lamb's Chapel withdrew its appeal and returned to the district court to obtain a final disposition and to allow the district court to reconsider its denial of injunctive relief in light of *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990). *See* App. 18a.

Upon return of the litigation to the district court, Center Moriches clarified in its motion for summary judgment that it relied ultimately upon section 414 of the New York Education Law for its defense:

[4] Section 414 does not expressly forbid the use of school premises for religious purposes. *See* Appendix D (App. 52a) (text of statute). A New York appellate court, however, has construed section 414 to authorize use only for "enumerated purposes" and has concluded that becase "religious purposes" are not listed in the statute, no such use is authorized. *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978).

> In the absence of Section 414 of the Education Law establishing a clear State policy, we would concede that the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other group may be allowed access. However, in the face of Section 414 which limits the access that can be permitted to school district facilities, it is clear that the State has established a policy of precluding use for non-permitted purposes.

Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990).

The district court granted summary judgment for Center Moriches. *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991) (App. 16a).

Lamb's Chapel appealed to the U.S. Court of Appeals for the Second Circuit. On March 18, 1992, that court affirmed the entry of summary judgment against Lamb's Chapel. *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992) (App. 1a).[5]

The Second Circuit ruled that public property may be either a "traditional public forum," a "purposefully opened" public forum (including a "subcategory" of "limited" or "designated" public fora), or a "non-public" forum. *Id.* at 385-86 (App. 8a-9a). The court of appeals held that Center Moriches school facilities fall "within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." *Id.* at 386 (App. 10a) (citation omitted).

The court of appeals observed that while New York Education Law section 414 authorizes a variety of uses for public school property, including social, civic and recreational meetings, *id.*, "[r]eligious uses are nowhere permitted in this enumeration," *id.* The court noted that

[5] The New York State Attorney General's Office, which was not a party in the district court, intervened on appeal.

in a prior decision, *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988), the Second Circuit had "adopted a state court interpretation of section 414 that the use of New York school facilities is confined to nonreligious purposes," *Lamb's Chapel*, 959 F.2d at 387 (App. 10a-11a) (citing *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978) ("Religious purposes are not included in the enumerated purposes for which a school may be used under section 414 . . . . Consequently, the Board of Education had no authority to grant petitioners' request to form bible clubs in the public high schools")).[6]

Pursuant to *Trietley* and *Deeper Life*, the Second Circuit construed section 414 to render public school facilities "a limited public forum from which religious uses would be excluded." *Lamb's Chapel*, 959 F.2d at 387 (App. 11a) (citation omitted).

Relying upon *stare decisis*, the court of appeals held that in a "limited public forum," government may "impose a blanket exclusion on certain types of speech" so long as it does not "selectively deny access" among "expressive activities of a certain genre," *id.* (internal quotation marks omitted) (citing *Travis v. Owego-Apalachin School District*, 927 F.2d 688, 692 (2d Cir. 1991)). The court held that the only remaining question was whether Center Moriches "has opened its facilities to religious uses

[6] The *Trietley* decision predated both *Widmar v. Vincent*, 454 U.S. 263 (1981) (granting equal access, under First Amendment, to university facilities for student religious group), and *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990) (granting equal access, under federal Equal Access Act, to high school facilities for student religious group). *Trietley* rejected an equal access claim by a high school student bible club. In *Deeper Life*, which also predated *Mergens*, the Second Circuit held that religious groups have no constitutional right of equal access *in general* to public school facilities, but that where—as in *Deeper Life*—the school district has *in fact* permitted prior *religious* uses, religious groups may have a valid claim to equal treatment.

and purposes" in the present case. 959 F.2d at 387 (App. 12a). Declaring this to be "a close question," *id.*, the court reviewed the evidence and concluded that "none of the prior uses" of Center Moriches property "were for religious purposes." *Id.* at 388 (App. 14a).

The court of appeals did not explain why Lamb's Chapel's planned film series would not be of the same "genre" as social, civic, recreational, or other permitted uses. Nor did the court identify any government interest—compelling, substantial, or even rational—that allegedly supported the exclusion of private users from government facilities solely on the basis of the religious content or purposes of the intended use.

REASONS FOR GRANTING THE WRIT

This case presents the question whether a public school district, which makes its facilities generally available for the activities of non-school community groups during non-school hours, may deny permission to use school facilities to show a film solely because of the religious content of that film.

Petitioner Lamb's Chapel wishes to show a film series on issues confronting modern families. If this *same* entity (Lamb's Chapel) sought to address the *same* topic (contemporary family issues) through the *same* medium (a film series), with the single difference that the film omitted all references to a religious perspective, Center Moriches would have no objection to the use of its facilities under the same terms as any other use by outside groups. But because the film series includes a religious point of view, Center Moriches has refused permission to show the film. This is blatant government censorship of private religious speech.

The decision of the Second Circuit, rejecting petitioners' claim to equal access to public school facilities, conflicts with the decisions of every other federal court of appeals

that has addressed the relevant issues, conflicts with the clear teachings of this Court, and presents important and recurring questions of constitutional law. Therefore, this Court should grant the petition for certiorari.

I. THE DECISION OF THE SECOND CIRCUIT DENYING EQUAL ACCESS TO SCHOOL FACILITIES DURING NON-SCHOOL HOURS FOR RELIGIOUS SPEECH IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, THIRD, AND FIFTH CIRCUITS.

The Second Circuit held that a public school district may deny equal access to the after-school use of its facilities by outside organizations solely on the basis of the religious content or purpose of the planned use. This holding is in square conflict with the decisions of at least three other federal circuits:

—the First Circuit held, in *Grace Bible Fellowship, Inc. v. Maine School Administrative District # 5*, 941 F.2d 45 (1st Cir. 1991), that a policy not to lease school facilities to outside groups for activities "for the direct advancement of religion" was unconstitutional;

—the Third Circuit held, in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), that a school policy which forbade use of school facilities by outside groups "for religious services, instruction, and/or religious activities" was unconstitutional; and,

—the Fifth Circuit held that public school facilities which are made available to a variety of outside groups constitute a public forum for free speech, *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978), and that in such public forum property, a policy excluding religious groups is unconstitutional, *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) (library auditorium).

The Seventh Circuit has strongly suggested, albeit in *dicta*, that it would embrace the same rule. *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1113-14 (7th Cir. 1986) (arbitrary exclusion of private religious speech from public school facilities would be unconstitutional). *Cf. Salinas v. School Dist. of Kansas City, Mo.*, 751 F.2d 288, 290 (8th Cir. 1984) (rejecting equal access claim because use permit was withdrawn on strictly procedural grounds and the "school district policy does not deny access to school facilities to religious groups"). *See also Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (overturning policy banning use of school facilities "for religious worship or other religious purposes").

Petitioners are aware of no federal court outside of the Second Circuit that has reached a contrary conclusion. Nor could a contrary view square with the clear teachings of this Court.

When a governmental body makes its facilities available for general use by private parties, it may not selectively exclude users on the basis of the religious content of their speech or activities. *Widmar v. Vincent*, 454 U.S. 263 (1981) (granting equal access, for student religious groups, to university facilities). This Court has explicitly held that the Establishment Clause—the typical defense offered for discrimination against private religious speech—presents no obstacle to the constitutional requirement of equal access. *Id.* at 271-75.

The fact that the present case involves high school facilities makes no difference. *Widmar* involved college students. But in *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990), this Court held that equal access by *high school students* to school facilities rests securely within the scope of the holding in *Widmar*.

Accordingly, if a public school district opens its facilities for social, civic, and recreational activities by com-

munity groups, that district may not selectively deny access to otherwise qualified groups solely on the basis that their meeting or activity is for religious purposes.

In the present case, New York state law explicitly authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments" which are "open to the general public," N.Y. Educ. Law § 414(1)(c) (App. 53a). The official rules and regulations of Center Moriches likewise authorize community groups to use school premises for, *inter alia*, "social, civic, or recreational use . . . ." Rules & Regs. # 10 (App. 57a). And in practice, Center Moriches has made its facilities available for a great variety of social, civic, and recreational activities by numerous groups (e.g., the Manorville Humane Society, the Unkechaug Dance Group, the Moriches Bay Civic Association, the Chamber of Commerce, and the Southern Harmonizers Gospel Group).

Nevertheless, Center Moriches expressly forbids the use of school facilities for religious purposes. Rules & Regs. # 7 (App. 57a). Because Lamb's Chapel wished to show a film series with religious content, Center Moriches barred it from school facilities.

In sustaining this plain denial of equal access for religious speech, the Second Circuit rendered a decision in square conflict with the decisions of the First, Third, and Fifth Circuits listed above.

II. THE DECISION OF THE SECOND CIRCUIT THAT PUBLIC SCHOOL FACILITIES WHICH ARE MADE AVAILABLE TO OUTSIDE GROUPS FOR SOCIAL, CIVIC, AND RECREATIONAL PURPOSES ARE NOT DESIGNATED PUBLIC FORA IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS.

The Second Circuit held that the school facilities of Center Moriches are not public forum property for purposes of free speech, even though these facilities are

available for, *inter alia*, social, civic, and recreational use by the local community. This holding is in square conflict with the decisions of at least four other federal circuits.

The federal courts of appeals for the First, Third, Fourth, and Fifth Circuits have held that school facilities made available for social, civic, and recreational use by outside groups are designated public fora subject to the strict standards governing traditional public fora.[7] *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978). District courts in at least three other federal

[7] This Court regularly employs "forum" analysis in resolving claims of access to public property for purposes of free speech. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) ("we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or non-public"). There are "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property, such as public streets and parks, traditionally open to assembly and debate. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] . . . for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981), municipal theaters made available for private dramatic productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and school board meetings opened for citizen input, *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966).

circuits have held the same. *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745, 752 (M.D. Tenn. 1990); *Wallace v. Washoe County School Dist.*, 701 F. Supp. 187 (D. Nev. 1988); *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983). Petitioners are aware of no federal court outside of the Second Circuit that has held to the contrary.

In conflict with all of these decisions, the Second Circuit held in the present case that the school facilities of Center Moriches were not designated public fora subject to the strict standards governing public fora. 959 F.2d at 386 (App. 19a). Instead, the court below held that Center Moriches had created a "limited public forum" which, according to the Second Circuit, was the equivalent of a "nonpublic forum" for purposes of content-based exclusions from the use of school facilities. *Id.*[8] The court below reached this conclusion despite the explicit provision for social, civic, and recreational use by the community both in the relevant New York statute, N.Y. Educ. Law § 414(1)(c) (App. 53a), and in the official policy of Center Moriches, Rules & Regs. # 10 (App. 57a), and despite the consistent practice of Center Moriches allowing a diversity of outside groups to use its facilities, *see supra* pp. 4-5.

Public school facilities are not traditional public fora. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). But school facilities become *designated* public

[8] The Second Circuit plainly misapplied the concept of a "limited public forum." *Any* content-based exclusions of speech would be constitutional if the forum were defined, in circular fashion, by these very same exclusions. Center Moriches has not created a true limited forum in a manner that would bar Lamb's Chapel on the basis of its *status*—for example, by allowing use only by students, or only by students and their parents. *Cf. Widmar*, 454 U.S. at 267 n.5. Nor is this a case in which Center Moriches is conducting a public meeting while reserving control over the subject matter. *Cf. Madison Joint School Dist.*

fora when "school authorities have 'by policy or practice' opened those facilities 'for *indiscriminate use by the general public*,' . . . or by some segment of the public, such as student organizations." *Id.* (emphasis added; citation omitted). School authorities may not exclude otherwise eligible speakers[9] from designated public fora solely on the basis of the *content of their speech* unless the selective exclusion "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270 (citation omitted).

By disregarding this clear constitutional doctrine, the Second Circuit reached a decision that conflicts squarely with the decisions of at least four other circuits, as set forth above.

III. THE DECISION OF THE SECOND CIRCUIT SUSTAINING DISCRIMINATION AGAINST PRIVATE RELIGIOUS SPEECH CONFLICTS WITH THE DECISIONS OF THIS COURT EVEN UNDER THE DEFERENTIAL STANDARD GOVERNING NONPUBLIC FORA.

Center Moriches barred Lamb's Chapel from using school facilities solely because of the religious viewpoint of the film series Lamb's Chapel planned to show. By upholding this discriminatory exclusion, the Second Circuit rendered a decision that conflicts with the decisions of this Court even if the relevant forum is deemed nonpublic.

The court below effectively held that the school facilities of Center Moriches are nonpublic fora. Although the court purported to hold that the facilities were a "limited public forum," the Second Circuit made it clear that, in its view, the facilities are a "nonpublic forum" as to activities with religious contents or purposes. 959 F.2d at 386 (App.

[9] Excluding all *non-student* groups from designated public forum school facilities, for example, would be permissible. *Widmar*, 454 U.S. at 267 n.5.

10a). Even if this content-based forum analysis reflected proper constitutional doctrine—which it does not—the *per se* exclusion of religious speech by private persons would still fail the test for exclusions from nonpublic fora.

This Court has explained that "[c]ontrol over access to a nonpublic forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). The exclusion in the present case fails even this deferential standard.

First, the discrimination in this case is not based on either *subject matter* or *speaker identity*. Lamb's Chapel wishes to show a film series on the issues confronting families in the modern age. If this *same* entity (Lamb's Chapel) proposed to address the *same* topic (the family) through the *same* medium (a film series), with the solitary difference that there were no references to a religious perspective, the series would clearly be unobjectionable to Center Moriches. Center Moriches is engaging in direct censorship of private religious speech.

Second, the *per se* exclusion of a religious perspective is *viewpoint-discriminatory*.[10] A rule banning religious speech is patently content-based. But as the facts of this case make clear, the exclusion of religious speech is also viewpoint-discriminatory. Lamb's Chapel is free to address the identical topic—the family in the modern world —*so long as it does not do so from a religious viewpoint*. A more flagrant policy of viewpoint exclusion would be difficult to imagine.

Third, there is simply *no reasonable basis* for the *per se* exclusion of speech based upon its religious content. Center Moriches claims to rely upon a state statute in defense of its discriminatory policy. In light of the federal Supremacy Clause, however, this statute can provide no rational defense. *Widmar* and *Mergens* render completely untenable any suggestion that speech by private parties, in school facilities available for use by a variety of outside organizations, could somehow trigger a violation of the Establishment Clause. Center Moriches has offered no other colorable rationale for its censorship of private religious speech, and the Second Circuit made no effort to identify any such rationale.

[10] *Cf. May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (discrimination against religious speech is restriction on a particular point of view).

Ultimately, then, Center Moriches is asserting the sheer power to exclude private religious speech for no better reason that just because Center Moriches says so. This assertion of a stark power of anti-religious discrimination is incompatible with the Constitution under any standard. *Accord Gregoire*, 907 F.2d at 1382 n.14 ("While we have . . . applied strict scrutiny analysis to the facts before us, we are by no means convinced that the reasons advanced by [the school district] for excluding [the religious group] could withstand review even under a rational basis standard"); *May*, 787 F.2d at 1113 (the "contention —that the school discriminates arbitrarily against one type of speech, religious speech—would if true establish an abridgment of free speech however one classifies the [school facilities] along the range of public-private forum").

IV. THE DECISION OF THE SECOND CIRCUIT UPHOLDING THE DISCRIMINATORY EXCLUSION OF PRIVATE RELIGIOUS SPEECH FROM PUBLIC SCHOOL FACILITIES CONFLICTS WITH THE DECISIONS OF THIS COURT UNDER THE ESTABLISHMENT CLAUSE.

The Second Circuit summarily rejected Lamb's Chapel's argument that the selective exclusion of religious speech on the basis of its content violates the Establishment

Clause, 959 F.2d at 389 (App. 15a). This holding conflicts with the relevant decisions of this Court.

First, a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 110 S. Ct. at 2371 (plurality). *Accord Gregoire*, 907 F.2d at 1380; *Grace*, 941 F.2d at 48.

The Establishment Clause of the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Id.*

Second, a policy of equal access for religious speech "would in fact *avoid* entanglement with religion," *Mergens*, 110 S. Ct. at 2371 (plurality) (citation omitted). Center Moriches would inevitably entangle itself unconstitutionally with religious affairs by the mere enforcement of its policy of religious exclusion. As this Court explained in *Widmar*, an educational institution which excludes private religious speech

> would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11 (internal quotation marks and citations omitted). *Accord Gregoire*, 907 F.2d at 1381; *Country Hills*, 560 F. Supp. at 1218.

The ultimate purpose of the Establishment Clause was the safeguarding of religious exercise against the power

of the state. The present case presents a classic instance of explicit governmental oppression of religion. By sustaining this unconstitutional government policy, the Second Circuit disregarded the teachings of *Widmar*, *Mergens*, and other decisions of this Court construing the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

In view of the Second Circuit's clear departure from the decisions of this Court, and in view of the fact that the Second Circuit stands alone in pursuing this deviant course, in conflict with the consistent view of the other federal circuits, *see supra* §§ I, II, this Court should consider disposing of this petition by summary reversal of the judgment below under Rule 16.1.

Respectfully submitted,

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June 16, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 470—August Term, 1991

(Argued November 4, 1991 Decided March 18, 1992)

Docket No. 91-7718

LAMB'S CHAPEL and JOHN STEIGERWALD,
Plaintiffs-Appellants,

—against—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO, in her official capacity as president of the Board of Education for Center Moriches Schools,

Defendants-Appellees,

NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Intervenor.

Before:

CARDAMONE, PIERCE and MINER,
Circuit Judges.

Appeal from summary judgment entered in United States District Court for the Eastern District of New York (Wexler, *J.* in favor of defendants School District and Board of Education President in action for declaratory and injunctive relief brought to redress defendants'

refusal to allow plaintiffs use of school facilities during non-school hours for showing of religious film series.

Affirmed.

MARK N. TROOBNICK, Washington, D.C. (Jordan W. Lorence, Concerned Women for America Legal Foundation, Jay A. Sekulow, Walter M. Weber, Free Speech Advocates, Washington, D.C., of counsel *for plaintiffs-appellants.*

HAROLD G. TRABOLD, Patchogue, N.Y. (Dranitzke, Lechtrecker & Trabold, Patchogue, N.Y., August H. Englert, Fiedelman & Hoefling, Jericho, N.Y., of counsel) *for defendants-appellees Center Moriches Union Free School District and Louise Tramontano.*

JEFFREY I. SLONIM, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General, Lawrence S. Kahn, Deputy Solicitor General, Attorney General's Office, State of New York, N.Y., of counsel) *for Intervenor New York State Attorney General.*

Jay Worona, Albany, N.Y. (Cynthia P. Fletcher, New York State School Boards Association, Inc., Albany, N.Y., of counsel) *for Amicus Curiae New York State School Boards Association, Inc.*

MINER, *Circuit Judge*:

Plaintiffs-appellants Lamb's Chapel and John Steigerwald appeal from a summary judgment entered in the United States District Court for the Eastern District of New York (Wexler, *J.*) in favor of defendants-appellees Center Moriches Union Free School District and Louise Tramontano, as President of the Board of Education of the School District. Lamb's Chapel is an Evangelical Christian church, incorporated under the New York not-for-profit corporation law, located at Center Moriches,

Suffolk County, New York. John Steigerwald is the Pastor of Lamb's Chapel. The School District is a subdivision of the State of New York duly organized to provide public education in Suffolk County. This action was brought to secure declaratory and injunctive relief as redress for the refusal of the School District to allow the use of School District facilities, during non-school hours, for the showing of a series of religious films. The School District relied on a New York statute as well as a local rule in denying use of the facilities.

In granting summary judgment, the district court determined that the School District's facilities were "limited public forms," which had not been opened to religious groups by policy or practice. Accordingly, the court concluded that the facilities properly were barred to the plaintiffs in accordance with the New York Education Law and the School District's own Local Rules.

On appeal, appellants contend that the School District, having created public forums by policy and practice, has excluded speech from the forum on the basis of content. This, they argue, is violative of the First Amendment. Appellants also contend that the denial to them of equal access to the School District's facilities, based on the religious content of their speech, is a violation of the Establishment Clause. Finally, they contend that a prior decision of this Court upholding the New York statute that allows the exclusion of religious groups from school district facilities in the absence of a practice of opening the facilities to other religious organizations is erroneous and should not be followed. Finding no merit in any of these contentions, we affirm the judgment of the district court.

BACKGROUND

By application dated November 19, 1988, Pastor Steigerwald sought the use of rooms in the Center Moriches High School for Lamb's Chapel Sunday morning serv-

ices and for Sunday School. The hours specified were 9:00 A.M. to 1:00 P.M., and the time period indicated was one year, beginning in December of 1988. The application was made on a form provided by the School District and entitled "Application For Use of School District Facilities." Attached to the application form was a sheet entitled "Rules and Regulations for Community Use of School Facilities." Rule No. 7 was set out as follows: "The school premises shall not be used by any group for religious purposes." Above his signature on the application form, Pastor Steigerwald indicated that he had read the Rules and Regulations and agreed to comply fully with them "excluding #7."

Accompanying the application, and dated November 21, 1988, was a letter to Alice Schoener, School District Clerk, from the Pastor. In the letter, Pastor Steigerwald introduced himself and his Church and noted that their "paramount objective [was] to share the love of Christ in very real and practical ways." He also indicated that he had taken a tour of the Center Moriches High School to "see if the school had adequate facilities for a movie series on the family that will be free of charge and open for the community to attend." Pastor Steigerwald stated in his letter that he had met with the high school principal, who was concerned that the content of the film be non-sectarian in view of the constitutional requirement for the "separation of church and state." The letter continued: "Those who espouse such a . . . view are seriously misinformed. Enclosed you will find several articles that correctly interpret the law that is presently being upheld by the Supreme Court of the United States of America."

By letter dated November 23, 1988 on behalf of the School District, Ms. Schoener advised Pastor Steigerwald that the application "requesting the use of the high school for your Sunday services," was denied, citing Local Rule No. 7 as well as the State Education law. Re-

ferring to scheduling problems, Ms. Schoener further advised that she was "very much afraid that, even without the prohibited religious activity aspect, your request would have to be denied." Undeterred, Pastor Steigerwald pressed forward on December 16, 1988 with another application for use of the high school facilities, the second application being limited to one evening per week for five weeks. The hours designated were 7:00 P.M. to 10:00 P.M. and the activity specified was "Family emphasis & Movie presentation by Dr. James Dobson." The purpose set forth was "To open up the film to share some pracital [sic] insights about the family." The facilities requested were the auditorium or gymnasium.

In response to the second application Ms. Schoener wrote to Pastor Steigerwald on January 18, 1989 to request "a more detailed description of your proposed use (including a brochure describing the film)," noting that she was "hard pressed to determine from your description, what the five-part movie would represent" but "suspect[ed] that it would certainly have religious connotations." In the letter requesting additional information, Ms. Schoener observed that "[t]he district has not, in the past, allowed the high school auditorium to be used by any group primarily for its own purposes."

A brochure describing the film, "Turn Your Heart Toward Home," was forwarded by Pastor Steigerwald to Ms. Schoener on February 2, 1989. According to the brochure, the film comes in a 6-part series "every parent should see." In the film, Dr. James Dobson, said to be an expert on family life, "reminds parents of society's slide toward humanism—the undermining influences of radio, television, films and the press—which can only be counterbalanced by a loving home where Christian values are instilled from an early age." In her response dated February 8, 1989, Ms. Schoener advised Pastor Steigerwald as follows: "This film does appear to be church related and therefore your request must be refused." Addi-

tionally, Ms. Schoener denied a request made by Pastor Steigerwald on February 2, 1989, for use of the elementary or high school on Friday or Saturday evenings "for 'non-religious purposes' such as volley ball." The reason given was: "We do not schedule outside organizations to use the facilities on Fridays and Saturdays."

Pastor Steigerwald continued to press his petition. On October 11, 1989, he submitted yet another application for the use of Center Moriches School District facilities to show the same film series, described in this application as a "Family oriented movie from a Christian perspective." The stated purpose for Lamb's Chapel was "To invite community of Center Moriches to view this very practical movie for family raising." Once again, the use of an auditorium for five week days over a five-week period was sought. This last application met with a terse response by Ms. Schoener: "This film does appear to be church related and therefore your request must be refused."

The complaint in this action was filed on February 9, 1990 and includes four causes of action: violation of the Freedom of Speech and Assembly Clauses; violation of the Equal Protection Clause; violation of the Free Exercise Clause; and violation of the Establishment Clause. As to each cause, the plaintiffs allege that the defendants' actions were taken under color of state law and in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1983. The injunctive relief sought was an order permitting plaintiffs the use of the auditorium of the high school or elementary school to show the film series and to allow religious groups use of the facilities without discrimination because of the religious content of their speech. Also sought was a judgment declaratory of plaintiffs rights to use the facilities in question in accordance with constitutional protections guaranteed by the First and Fourteenth Amendments, including the Free Speech, Freedom of Assembly, Free Exercise, Establishment and

Equal Protection Clauses of the Constitution. Plaintiffs also sought a declaration of the unconstitutionality of section 414 of the New York Education Law to the extent it bars the use of school district facilities for purposes of religious speech.

Plaintiffs' motion for a preliminary injunction to compel the School District to allow the use of the District's facilities was denied by the district court in a Memorandum and Order dated May 16, 1990. The court reviewed the facts presented on the motion as well as the applicable legal and constitutional principles and concluded that plaintiffs had "not shown either a substantial likelihood of success on the merits or sufficiently serious questions going to the merits." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 736 F. Supp. 1247, 1254 (E.D.N.Y. 1990). An appeal to this Court from the Order denying the preliminary injunction was withdrawn, and the matter was returned to the district court for further proceedings. Thereafter, the plaintiffs moved for summary judgment and the School District cross-moved for the same relief. After hearing testimony as well as considering exhibits and affidavits, the district court granted the School District's motion and denied the plaintiff's motion in a Memorandum and Order dated July 15, 1991, giving rise to this appeal.

In granting summary judgment, the district court found "that if the intended use of school facilities is not required or authorized by statute, there is no constitutional right to such use where a school district has not, by policy or practice, permitted a similar use in the past." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 770 F. Supp. 91, 98 (E.D.N.Y. 1991). Although it determined that the Center Moriches School District facilities are limited public forums, the court concluded that the "District ha[d] not, by policy or practice, opened its doors to groups akin to Lamb's Chapel," and therefore held "that the School District's denial of plaintiffs' ap-

plications to show the film series [was] viewpoint-neutral and, hence, constitutional." *Id.* at 99. We agree with the conclusion reached by the district court.

DISCUSSION

According to the Supreme Court, the extent of permissible governmental regulation of expressive activity on publicly owned property is dependent upon the character of the public property in question. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). The Court has identified three categories of publicly owned property and has defined what regulatory power, consistent with the First Amendment, may be exercised in each category. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985).

The power of the State to regulate expression is most limited in regard to the category of public property designated "traditional public forum." Streets, parks and similar locales, said to "have immemorially been held in trust for the use of the public and [which], time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague v. CIO*, 307 U.S. 496, 515 (1939), fall within this classification. In such a forum, a regulation providing a content based exclusion may be enforced only when "necessary to serve a compelling state interest" and must be "narrowly drawn" to serve that purpose. *Perry*, 460 U.S. at 45. Also, narrowly tailored, content-neutral regulations pertaining to the time, place and manner of expression in a traditional public forum may be enforced, if they "serve a significant government interest, and leave open ample alternative channels of communication." *Id. See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The second category of public property pertinent to this analysis is made up of property purposefully opened

for use by the public for expressive activity. Although government is not required to open this sort of forum or to keep it open indefinitely, the regulation of expression in a locale encompassed within the second category must meet the same standards as are applicable to a traditional public forum. *Perry*, 460 U.S. at 46. Places opened specifically for the use of certain speakers or for the discussion of certain subjects are referred to as "limited" or "designated" fora. *See Longo v. U.S. Postal Service*, 953 F.2d 790, 793 (2d Cir. 1992); *Travis v. Owego-Apalachin School Dist.*, 972 F.2d 688, 692 (2d Cir. 1991). As to those fora, "the first amendment protections provided to traditional public forums only apply to entities of a character similar to those the government admits to the forum." *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986).

Least restricted is the power of government to regulate expression in the third category of public property—the non-public forum. Included in this category is property that is not open for communicative purposes either by tradition or designation. *Perry*, 460 U.S. at 46. With respect to such property, where governmental control is analogous to that of a private owner, *see United States Postal Service v. Council of Greenburgh*, 453 U.S. 114, 129-30 (1981), a reasonableness standard prevails, *see International Soc'y For Krishna Consciousness v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *cert. granted*, 112 S. Ct. 855 (1992). The standard is met when the applicable restrictions "reflect a legitimate government concern and do not suppress the speaker's view." *See Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991).

The Center Moriches School District facilities appellants sought to use do not fall within the categories of "traditional public forum" or "non-public forum," and appellants do not contend that they do. What appellants do contend is that the school authorities in the Center Moriches School District by policy and practice have opened the facilities for the use of the general public and

that the exclusion of religious speech is prohibited under the standards governing the second category. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). An examination of pertinent policy and actual practices, however, convinces us that the school property in question falls within the subcategory of "limited public forum," the classification that allows it to remain non-public except as to the specified uses. *See Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) (*Deeper Life I*).

In the matter of School District policy, the District is governed by section 414 of the New York Education Law and its own Local Rule No. 7. Section 414 sets out ten purposes for which the use of schoolhouse facilities may be granted throughout the State of New York: instruction; public library purposes; social, civic and recreational meetings; events for which admission fees are charged, if the fees are to be applied to educational and charitable (but not religious) purposes; elections and political meetings; civic forums and community centers; classes for mentally retarded minors; recreation and atheletics; child care services during non-school hours; and graduation exercises held by not-for-profit elementary and secondary schools, provided no religious service is performed. N.Y. Educ. Law § 414[1](a)-(j) (McKinney 1988 & Supp. 1992). Religious uses are nowhere permitted in this enumeration. All the uses specified are subject to such regulations as may be adopted by boards of education in the various school districts of the state, but the regulations must not conflict with the state law. *See id.* As previously noted, the Board of Education of the Center Moriches Union Free School District has provided in its Local Rule No. 7 that "[t]he school premises shall not be used by any group for religious purposes."

In *Deeper Life I* we adopted a state court interpretation of section 414 that the use of New York school facilities is confined to nonreligious purposes, *see Trietley*

v. Board of Educ., 65 A.D.2d 2d 1, 5-6, 409 N.Y.S.2d 912, 915 (4th Dep't 1978), and thereby ascertained the state's intent to create a limited public forum from which religious uses would be excluded. *See Deeper Life I*, 852 F.2d at 680. We determined in that case that under the statute and applicable New York City Board of Education regulations, the School Board had no discretion with respect to the granting of use permits to religious groups. *See Deeper Life Christian Fellowship v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991) (*Deeper Life II*).

Appellants argue, in effect, that once the school district facilities are opened as a public forum for one purpose, they are opened for all purposes. They take issue with our view that "property remains a nonpublic forum as to all unspecified uses . . . , and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitional muster," *Deeper Life I*, 852 F.2d at 679-80 (citations omitted), and contend that our view does not represent a proper interpretation of Supreme Court precedent. That challenge is barred by the rule of *stare decisis*, not only as a consequence of the *Deeper Life* cases but also as a consequence of our decision in *Travis*, where we held that "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." 927 F.2d at 692.

In *Travis*, the school district was constrained to open its facilities to a religiously-oriented, fund-raising entertainment event benefitting a pregnancy counselling organization affiliated with an organization that promoted Christian gospel evangelism, having previously opened the facilities to a religious Christmas program involving the collection of toys for needy children. "The Christmas program . . . created at least a limited public forum for fund-raisers with religious themes." *Id.* at 693. In

Deeper Life I, we sustained a preliminary injunction in a case in which a church sought the temporary use of an elementary school building, finding as a fair ground for litigation that "the School Board ha[d] opened this forum to t[he church] through a practice of granting permits to use public school facilities to other religious organizations." 852 F.2d at 680. Whether Center Moriches has opened its facilities to religious uses and purposes presents a close question here.

On appeal, appellants principally rely upon three prior uses of school district facilities to demonstrate a prior practice of opening Center Moriches public schools to outside of school religious uses: a Salvation Army Band Benefit Concert; a Gospel Music Concert; and a lecture series entitled "Psychology and the Unknown," given by Jerry Huck. The Band Benefit Concert involved performances by the Center Moriches High School Band as well as the Salvation Army Greater New York Youth Band. The money raised at this concert was used to provide a scholarship for a high school band member and to provide funds for children to go to summer camp. The only religious connotations found in the Joint Band Program were the invocation, the performance of a piece called "Jericho Revisited" and the finale, "God Bless America." Although appellants adduced evidence that "the Salvation Army is a church or a quasi-church," the Joint Band Program hardly can be described as any kind of a religious use of school district property. The theme of the Program was not religious and any reference to religion was incidental at best.

The Gospel Music Concert was performed by a group called the "Southern Harmonizers Gospel Singers." The purpose of the program was to raise money for the school's black student scholarship fund. The program consisted in the main of gospel and spiritual music. The business manager of the Singers defined gospel music as "the good news of God." Included in the program were

such well-known religious songs as "Amazing Grace!" and "The Lord is my Shepherd" from the Twenty-Third Psalm of the Old Testament. The business manager responded in the affirmative when asked if the concert could be enjoyed for the music itself. Obviously, this is so. Much of the world's greatest music has some religious connotation but can be enjoyed by people of all religious beliefs as well as people of no religious beliefs. The performance by the Southern Harmonizers was not a religious service or event but a musical and cultural one. It took place in a non-religious context and had a non-religious purpose.

The lecture series, "Psychology and The Unknown," by Jerry Huck, was sponsored by the Center Moriches Free Public Library. The library's newsletter characterized Mr. Huck as a psychotherapist who would discuss such topics as parapsychology, transpersonal psychology, physics and metaphysics in his 4-night series of lectures. Mr. Huck testified that he lectured principally on parapsychology, which he defined by "reference to the human unconscious, the mind, the unconscious emotional system or the body system." When asked whether his lecture involved matters of both a spiritual and a scientific nature, Mr. Huck responded: "It was all science. Anything I speak on based on parapsychology, analytic, quantum physicists [sic]." Although some incidental reference to religious matters apparently was made in the lectures, Mr. Huck himself characterized such matters as "a fascinating sideline" and "not the purpose of the [lecture]."

As is apparent from the foregoing, none of the prior uses pointed to by the appellants were for religious purposes. Nor are we able to discern any previous uses of any school district property for religious purposes upon an examination of the record. Incidental references to religion or religious figures, the occasional use of religious terms, and the performance of music with religious overtones do not convert a secular program into a religious

one. The programs cited as examples did not carry out religious themes nor were they presented in a religious context. We simply have not been able to identify any prior use of Center Moriches School District facilities for purposes that are religious in any meaningful way. We therefore conclude that the facilities were limited forums not opened to religious uses by policy or practice and that there was no constitutional violation in the failure of the School District to afford access to appellants.

Widmar v. Vincent, 454 U.S. 263 (1981) and *Board of Educ. of the Westside Community Schs. v. Mergens*, 110 S. Ct. 2356 (1990), relied upon appellants, do not dictate a contrary result. In *Widmar*, the Court held that a state university could not deny access to university facilities to *students* who wished to conduct religious meetings on campus. *Widmar*, 454 U.S. at 273. The Court found in that case that "[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups," noting that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." *Id.* at 267 & n.5. In *Mergens*, the Court held that the Equal Access Act, 20 U.S.C. § 4071(b) prohibited a high school from "discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time." 110 S. Ct. at 2370. The high school had created a limited open forum by allowing noncurriculum-related student groups to use the school facilities. The denial of a request to form a Christian club, under the circumstances revealed, constituted a denial of equal access under the Equal Access Act.

Although appellants contend that our *Deeper Life* opinions are incompatible with these Supreme Court decisions and that the decisions compel a reversal of the district court in the case as bar, the contention is baseless. *Widmar* involved the use of university property by student groups

in a situation where a number of such groups had been afforded access, to the point where, as to the students, a "generally open forum" was created. 454 U.S. at 267. Similarly, in *Mergens*, the religious use of school property was sought by students, who have a greater claim on the use of school property than outsiders, especially when the property generally is open to student groups. The Supreme Court decided *Mergens* purely on statutory grounds, noting that it did not need to decide whether the First Amendment requires the same result. In the *Deeper Life* cases, as in the case at bar, we are presented with outside organizations seeking access where access has been limited and all religious use has been barred by policy and practice.

The appellants argue that denial of access somehow violated the Establishment Clause of the First Amendment as well as the Freedom of Speech Clause. It is difficult to see how this is so. If anything, a claim of a violation of the Free Exercise Clause would be expected. Nevertheless, there is no basis for any claim of First Amendment violation here. We have considered all of the arguments advanced by the appellants and find them meritless.

CONCLUSION

The judgment of the district court is affirmed in all respects.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 90-0500

(Wexler, J.)

LAMB'S CHAPEL and JOHN STEIGERWALD,

—against— *Plaintiffs,*

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE BOARD OF EDUCATION FOR CENTER MORICHES SCHOOLS,

Defendants.

APPEARANCES:

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MEMORANDUM AND ORDER

WEXLER, District Judge

Plaintiffs Lamb's Chapel and John Steigerwald ("Steigerwald") brought an action before this Court for declaratory and injunctive relief against the Center Moriches

Union Free School District ("School District") and Louise Tramontano, in her official capacity as President of the School District's Board of Education (the "Board"), because of defendants' refusal to allow plaintiffs to use the School District's facilities during nonschool hours for the purpose of showing a film series by Dr. James Dobson, entitled "Turn Your Heart Towards Home" (the "film series"). On May 16, 1990, this Court issued a Memorandum and Order denying plaintiffs' request for a preliminary injunction on the basis that plaintiffs did not show either a substantial likelihood of success on the merits or sufficiently serious questions going to the merits of their case. *Lamb's Chapel v. Center Moriches School Dist.*, 736 F.Supp. 1247, 1254 (E.D.N.Y. 1990).

Thereafter, Lamb's Chapel appealed that decision to the Second Circuit Court of Appeals. The appeal was withdrawn and the case has been returned to this Court at the suggestion of the staff Counsel for the Second Circuit for final disposition, and to afford this Court an opportunity to reconsider its denial of injunctive relief in light of *Board of Education of the Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990). Currently before the Court are plaintiffs' motion for summary judgment and defendants' cross-motion for same, both pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. For the reasons stated below, defendants' motion is hereby granted and plaintiffs' motion is denied.

BACKGROUND

The undisputed facts, consisting of testimony and exhibits presented to the Court during the hearing on plaintiffs' motion for a preliminary injunction, are as follows:

Lamb's Chapel is an evangelical Christian church located in Center Moriches, New York, and incorporated under New York's Not-For-Profit Corporation Law; Steigerwald is its pastor. Since November of 1988, Steigerwald has submitted to defendants three applications on

behalf of Lamb's Chapel to use the School District's high school facilities.

The first application, dated November 19, 1988, stated that the purpose for which Lamb's Chapel sought to use the facilities was "to conduct Sunday a.m. service and Sunday School, Nursery, etc." Plaintiffs' Exhibit 5a [hereinafter Pl. Ex. #]. According to Steigerwald, this application was rejected because of the religious content of the film series that plaintiffs wished to show. Subsequently, by the second and third applications, dated December 16, 1988 and October 11, 1989, respectively, plaintiffs sought to use the high school auditorium for one evening for five consecutive weeks to show the film series. For purposes of this action, plaintiffs' conceded at the hearing that the film series is of a religious nature and the showing is for a religious purpose.[1]

Following an initial review of the December 16 application, by letter dated January 18, 1989, Alice Schoener ("Schoener"), the School District's business manager and district clerk wrote to Steigerwald on behalf of the Board to express the School District's concern that plaintiffs' use of the facilities appeared to be for a religious purpose. The letter indicated that the School District is

> bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> The district has not, in the past, allowed the high school auditorium to be used by any group primarily for its own purposes.
>
> . . . .

[1] In this regard, the October 11 application notes that the film series is a "family oriented movie from a Christian perspective." Pl. Ex. 7a.

> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film). . . . I will be happy to present your request to the Board of Education at our February meeting.

Pl. Ex. 6b. After receiving and reviewing the brochure, Schoener again wrote to Steigerwald on behalf of the Board, by letter dated February 8, 1989, rejecting the application because the film "appear[ed] to be church related." Pl. Ex. 6d. The third application, substantially similar to the second, was denied on the same basis.

According to defendants, the legal basis for refusing the requests was that the use of the facilities for religious purposes would violate § 414 of the New York Education Law[2] and Rule No. 7 of the School District's Rules and Regulations for Community Use of School Facilities ("Rule No. 7"),[3] which govern the use of school facilities.

Plaintiffs argue, however, that during 1987 and 1988 other organizations were allowed to use the school facilities, and that some did so for religious purposes.[4] In

[2] See Addendum.

[3] Rule No. 7 provides that "[t]he school premises shall not be used by any group for religious purposes." Pl. Ex. 5a. The Rules and Regulations further provide that groups requesting to use the school facilities must be composed predominantly of residents and/or students from the school community, although an exception is made for outside not-for-profit organizations, but only if the applicant demonstrates that there is a benefit to the school community. Rule No. 7.

[4] Plaintiffs list organizations which have been allowed to use the school facilities in the years 1987 and 1988:

> A New Age religious group known as the "Mind Center"
> Southern Harmonize Gospel Singers
> Salvation Army Youth Band
> Hampton Council of Churches' Billy Taylor Concert
> Center Moriches Co-op Nursery School's Quilting Bee

[Continued]

particular, plaintiffs point to performances by the Salvation Army Youth Band and the Southern Harmonize Gospel Singers, and a lecture series by the Mind Center, purportedly a New Age religious group.[5] Complaint at para. 18. Because of this practice, plaintiffs contend that they too should be allowed to use the school facilities for religious purposes. Plaintiffs argue that defendants have violated their first and fourteenth amendment rights of freedom of speech, freedom of association and free exercise of religion and their fourteenth amendment right to equal protection. Defendants contend that they may properly refuse to allow any group to use the facilities for religious purposes. In this respect, they maintain that they would not and did not knowingly allow any organization to use the school facilities for religious purposes. In addition, they argue that allowing plaintiffs to use the facilities for religious purposes would violate the Establishment Clause of the First Amendment, as well as § 414 of the New York Education Law and the School District's Rule No. 7.

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[4] [Continued]

Manorville Humane Society's Chinese Auction
Moriches Bay Power Squadron
Unkechaug Dance Group
Paul Gibson's Baseball Clinic
Moriches Bay Civic Association
Moriches Chamber of Commerce's Town Fair Day
Center Moriches Drama Club
Center Moriches Music Award Associations' "Amahl & the Night Visitors"
Saint John's Track and Field Program
Girl Scouts of Suffolk county
Cub Scouts Pack 23
Boy Scout Troop #414

(Plaintiffs' Brief in Support of Motion for Preliminary Injunction, at 7).

[5] The lecture series was sponsored by the Center Moriches Public Library. The series, entitled "Psychology and the Unknown," was on parapsychology and transpersonal psychology and dealt with eastern mysticism and metaphysics.

As previously stated, on May 16, 1990, this Court denied plaintiffs' motion for a preliminary injunction, finding that: (1) the School District, by enforcing restrictions on access imposed by state statute and by its own regulations, created a limited public forum; (2) as such, "'exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster.'" *Lamb's Chapel*, 736 F.Supp. at 1251 (quoting *Deeper Life Christian Fellowship, Inc. v. Board of Educ. of the City of New York*, 852 F.2d 676, 679-80 (2d Cir. 1988) (citations omitted)); (3) plaintiffs had failed to demonstrate sufficiently that the School District had a practice of permitting use of school facilities by any organizations for religious purposes; and (4) there was no equal protection violation where the evidence showed that all organizations had been prohibited from using the school facilities for religious purposes. In short, this Court determined that "[t]he Constitution does not require a public school district to open its school buildings to indiscriminate use where the state has by policy and practice circumscribed availability through reasonable and viewpoint-neutral regulations." *Id.* at 1254.

DISCUSSION

A. Effect of *Mergens*

In 1990, the Supreme Court heard the case of *Board of Education of the Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990). In *Mergens*, the Supreme Court was called upon to decide whether Westside High School (the "School" or "Westside") was prohibited by the Equal Access Act ("EAA" or the "Act"), 98 Stat. 1302, 20 U.S.C. §§ 4071-74, from "denying a *student religious group* permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment." *Mergens*, 110 S.Ct. at 2362 (emphasis added).

The facts involved in *Mergens* are simple and differ substantially from the facts before this Court. In *Mergens*, a group of high school students brought suit against the School District after the School Board upheld Westside's denial of Mergens's request to organize, for the purpose of enabling voluntary student members to study the Bible and to pray together, a Christian Club having the same privileges and conditions as other student groups at Westside, with the exception that it would not have a faculty sponsor. The School, which is a public secondary school and which receives federal financial assistance, denied Mergens's request primarily on the basis that the formation of a religious club would violate the Establishment Clause.

Respondents, current and former Westside students, by and through their parents as next friends, brought an action in the United States District Court for the District of Nebraska seeking declaratory and injunctive relief. Respondents argued that the denial of Mergens's request to form the proposed club violated the EAA "which prohibits public secondary schools that receive federal assistance and that maintain a 'limited open forum' from denying 'equal access' to students who wish to meet within the forum on the basis of the content of the speech at such meetings." *Mergens*, 110 S.Ct. at 2363 (citing 20 U.S.C. § 4071(a)). Respondents also contended that the School Board's actions deprived them of their first and fourteenth amendment rights of freedom of speech, association, and the free exercise of religion.

The district court held for the petitioners on the basis that the Act did not apply to Westside because, the district court determined, all of Westside's student clubs were related to the School's curriculum and, hence, Westside had not created a "limited open forum." *Id.* The United States Court of Appeals for the Eighth Circuit reversed, holding that the district court was incorrect in determining that all of Westside's student clubs were

related to the curriculum. Rather, the Eighth Circuit concluded that because student clubs existed at the school which were noncurriculum related, Westside had created a "limited open forum" as defined by the Act and, therefore, "the Act applied to 'forbi[d] discrimination against [respondent's] proposed club on the basis of its religious content.'" *Id.* (quoting *Mergens v. Board of Educ. of Westside Community Schools*, 867 F.2d 1076, 1079 (8th Cir. 1989), *aff'd sub nom. Board of Educ. of Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990)).

Under the EAA, a "limited open forum" exists when a public secondary school allows the opportunity for at least one noncurriculum related student group to meet on school grounds during noninstructional hours. 20 U.S.C. § 4071(b). After a lengthy discussion about the meaning of the term "noncurriculum related student group," the *Mergens* Court defined the term to include "any student group that does not *directly* relate to the body of courses offered by the school." *Mergens*, 110 S.Ct. at 2366 (emphasis in original). The Court noted that a student group is directly related to a school's curriculum if the subject matter of the group is currently taught, will be taught soon, is required by school, or if academic credit is given for participation in the group in question. *Id.*

The Supreme Court affirmed the court of appeals and held that because Westside had created a "limited open forum" the denial of the request to form a Christian club constituted a denial of "equal access" under the EAA. *Id.* at 2370. The Court found that by enacting the EAA in 1984, Congress extended the holding of *Widmar v. Vincent*, 454 U.S. 263 (1981), to public secondary schools. In *Widmar*, the Supreme Court determined that a state university regulation that prohibited students from using university facilities for religious purposes was invalid on free speech grounds. *Widmar*, 454 U.S. at 263. The Supreme Court held that an "'equal access' policy would not violate the Establishment Clause," *id*, at 271-74, un-

der the three-prong test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[6]

Relying on its definition of "noncurriculum related student groups," the *Mergens* Court affirmed the Eighth Circuit's finding that one or more of such groups existed at Westside and, therefore, Westside had created a "limited open forum" under the Act. 110 S.Ct. at 2368-70. Accordingly, the Court determined that the Act prohibited Westside from "discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time." *Id.* at 2370.

The Supreme Court found no merit in petitioners' argument that the Court's interpretation of the EAA wrested control of school affairs from local school boards. The Court reasoned that school districts could sidestep the EAA by "choos[ing] to structure its course offerings to avoid the Act's obligations . . . ." *Id.* at 2367. Further, the Supreme Court noted that, under the Act, schools remain free to "prohibit meetings that would 'materially and substantially interfere with the orderly conduct of educational activities within the school.'" *Id.* (quoting 20 U.S.C. § 4071(c)(2) (additional citation omitted)). Lastly, the Court pointed out that school districts that wished to avoid the Act's mandates could do so by refusing federal funding. *Id.*

The Supreme Court concluded that the School's refusal to allow respondents to form a Christian club denied them "equal access" under the EAA. *Id.* at 2370. It is significant that the Supreme Court decided solely on statutory grounds. In fact, the Court stated, "[W]e need not decide—and therefore express no opinion on—whether the First Amendment requires the same result." *Id.*

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[6] Under this three-prong test, a governmental policy will not offend the Establishment Clause if: (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13.

The Court addressed the issue of whether the Act, as interpreted, "violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment." *Id.* Underlying this issue was petitioner's argument that officially sanctioning the proposed club would, in effect, result in a violation of the Establishment Clause. The Supreme Court disagreed. Applying the logic of *Widmar*, where the Court found that a policy allowing equal access to university facilities to religious groups did not violate the Establishment Clause, 454 U.S. at 271-75, a plurality of the *Mergens* Court concluded that the EAA was capable of withstanding the constitutional rigors of *Lemon*. *Id.* at 2371 (plurality opinion). Justices O'Connor, White, and Blackmun grounded their determination on the fact that the Act not only prohibited discrimination of religious speech but also of "political, philosophical or other" speech. Accordingly, they attributed a secular purpose to the Act. *Id.* (citations omitted).

Likewise, they found that the Act did not have the primary effect of advancing religion and proffered three grounds on which to rest their conclusion. First, Justice O'Connor stated that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, with the Free Speech and Free Exercises Clauses protect." *Id.* at 2372 (plurality) (emphasis in original) (reasoning that high school students were sufficiently capable of understanding the difference between a school's "endorsing student speech" and "merely permit[ting]" it). Second, support was found in the terms of the Act itself which require meetings to be held when classes are not in progress, 20 U.S.C. § 4071(b), and which restricts school officials from participating at the meetings of student religious groups. 20 U.S.C. § 4071(c). Third, O'Connor determined that, given the vast array of officially sanctioned student groups, the fear of "official endorsement of or preference for religion or a

particular religious belief" was unfounded. *Id.* at 2372-73.

Finally, Justice O'Connor found that compliance with the Act did not create a possibility of excessive entanglement between government and religion. The plurality looked to the boundaries of the Act itself which prohibit school "sponsorship" of religious clubs, 20 U.S.C. § 4071 (c) (2), and which, for example, forbid faculty members from participating in any such meetings. 20 U.S.C. § 4071(c) (3) (although a faculty member may be assigned for "custodial purposes").

As noted, the case at bar was returned to this Court at the suggestion of the Second Circuit's Staff Counsel because of the Supreme Court's decision in *Mergens*. Plaintiffs argue that "*Mergens* obviously changes the constitutional landscape as far as equal access for religious speech on public school grounds goes." Plaintiff's Supplementary Memorandum in Support of Motion for Summary Judgment at 10. Plaintiffs ask this Court to apply the reasoning of *Mergens* to the facts before this Court. In contrast, defendants contend that *Mergens* is without effect on this case because the Supreme Court's decision rested entirely on the EAA. Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment at 2. Defendants correctly observe that the question to be decided by this Court, post-*Mergens*, "is not whether the school district *may*, under circumstances where its policy, practice or state law otherwise provide for such access, open its forum to religious use, but whether it *must* open its forum to such use in the face of a policy, practice and in New York a state legislative enactment (§ 414 [of the] Education Law) which specifically prohibits such use." *Id.* at 4 (emphasis in original). This Court finds no such mandate in the *Mergens* decision.

Plaintiffs again put forth the argument that the School District has created an open forum by policy and

practice. This Court previously determined that "by enforcing restrictions on access imposed by state statute and by its regulations, the School District has created limited public forums." *Lamb's Chapel*, 736 F.Supp. at 1251. In so finding, the Court specifically rejected plaintiffs' argument that defendants created an "open forum" merely by allowing groups unrelated to the School District to meet on school district premises. Specifically, the Court ruled that the School District "has not by policy or practice either opened its facilities to indiscriminate use by the general public or some segment of the public." *Id.*

This is noteworthy because of the Supreme Court's discussion in *Mergens* about the importance of the distinction between the two designations. The Supreme Court pointed out that the EAA is specifically limited to schools that maintain a "limited open forum." *Mergens*, 110 S.Ct. at 2363 (citing 20 U.S.C. § 4071(a)). In fact, the Court stated that:

> [T]he Act itself neither uses the phrase "limited public forum" nor so much as hints that the doctrine is somehow "incorporated" into the words of the statute. The operative language of the statute, 20 U.S.C. § 4071(a), of course, refers to a "limited open forum," a term that is specifically defined in the next subsection, § 4071(b). Congress was presumably aware that "limited public forum," as used by the Court, is a term of art . . . and had it intended to import that concept into the Act, one would suppose that it would have done so explicitly. Indeed, Congress' deliberate choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases.

Id. at 2367-68 (citations omitted).

The significance of the Supreme Court's language rests in its application of the EAA to the Court's determina-

tion that petitioners were in violation of the Act. The situation before this Court is readily distinguishable where defendants have created a limited public form to which the Act does not apply.

Moreover, nothing in plaintiffs' argument convinces this Court to stretch the holding in *Mergens* to accommodate the facts before this Court. In *Mergens*, the Supreme Court adopted the logic of *Widmar*. Underlying that reasoning was the *Widmar* Court's decision to limit the holding to "persons *entitled* to be [on the campuses of State universities]." *Widmar*, 454 U.S. at 268 (emphasis added). Likewise, *Mergens* is distinguishable from the present case in that *Mergens*, like *Widmar*, is addressed to students "entitled" to be on school premises.

This Court is presented with a very different scenario. Plaintiffs, who are *not* students, are seeking to use school facilities during nonschool hours. The Second Circuit has specifically held that, at least in New York, public schools "are not, as to the general community, traditional public fora." *Deeper Life*, 852 F.2d at 679 (citations omitted). As noted, under circumstances where a school district creates a "limited public forum," as is the situation here, "property remains a nonpublic forum as to all unspecified uses, . . . and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80. Nothing the School District has done, by its policy or its practice, belies this standard.

Significantly, after the Supreme Court rendered its decision in *Mergens*, the Second Circuit decided the case of *Travis v. Owego-Appalachin School District*, 927 F.2d 688 (2d Cir. 1991), a case involving the same issue as the one before this Court.[7] In *Travis*, the Second Circuit

[7] The Court notes that the Second Circuit cites *Mergens* only for the proposition that an open-door policy that "allow[s] religious speech does not 'endorse' or 'establish' a religion." *Travis*, 927 F.2d at 694 (citing *Mergens*, 110 S.Ct. at 2370-73, 2377-78) (plurality and concurring opinions) (additional citation omitted)).

ruled that a school district's denial of plaintiff Birthright of Owego, Inc.'s application to use the school district's facilities for the purpose of a fundraiser involving "religious and/or political activity" constituted a violation of the Free Speech and Establishment Clauses. 927 F.2d at 694. The *Travis* court, which found that defendants had created a limited public forum, based its conclusion on the school district's past practice which included permitting school facilities to be used for a religious Christmas program. As such, defendant's selective denial of Birthright's application was not viewpoint-neutral and, therefore, was unconstitutional. *Id.* at 692-94. In contrast, this Court ruled that the Center Moriches School District's past practice has prohibited such use in all cases.

However, this Court finds the most compelling support for its decision in the language of *Mergens* itself which states, "[b]ecause we rest our conclusion on statutory grounds, we need not decide—and therefore express no opinion on—whether the First Amendment requires the same result." *Mergens*, 110 S.Ct. at 2370. As defendants accurately assert, the *Mergens* decision rested on an act of Congress, permitting secondary school students to conduct religious activities on school premises. Neither Congress nor the Supreme Court has seen fit to require a school district to open its doors to nonstudents who wish to use school facilities for the purpose of conducting religious activities within a school. Therefore, this Court finds that if the intended use of school facilities is not required or authorized by statute, there is no constitutional right to such use where a school district has not, by policy or practice, permitted a similar use in the past. *See Mergens*, 110 S.Ct. at 2370; *Travis*, 927 F.2d at 692.

B. *Summary Judgment*

A motion for summary judgment may be granted only when "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987). The burden is on the moving party to clearly establish the absence of a genuine issue as to any material fact. *Donahue*, 834 F.2d at 57. In addition, the district court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). However, the moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [but] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The Court notes that an unresolved factual issue is one that a reasonable fact finder could decide in favor of either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Currently, both parties move for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Having found that *Mergens* is not controlling, the Court turns to address these motions.

The parties agree that the case is to be decided on the basis of the undisputed facts which consist of testimony and exhibits presented to the Court during the hearing on the motion for a preliminary injunction. In this Court's May 16, 1990 decision, the Court determined that "plaintiffs have not sufficiently shown that defendants have a practice of permitting use by any organization for religious purposes." *Lamb's Chapel*, 736 F.Supp. at 1253. In the absence of such a finding, summary judgment is appropriate. *See Travis*, 927 F.2d at 692. As both the Supreme Court and the Second Circuit have noted, "[t]he First Amendment . . . does not guarantee

unlimited access to government-owned property for purposes of expression. Government may thus properly regulate such access depending on the nature of the property at issue." *Id.* at 691 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985)).

Based on the record, this Court determined that the School District's facilities are "limited public forums." *Lamb's Chapel*, 736 F.Supp. at 1252. The Court based its determination, in part, on the fact that, while § 414 of the New York Education Law enumerates nine purposes for which public school facilities may be used by the general public, nowhere does it include religious worship or instruction. *See* § 414; *Deeper Life*, 852 F.2d at 680 (stating that critical to determining whether the state has created a limited public forum is the state's intent in establishing the forum). Moreover, Rule No. 7 explicitly proscribes using school facilities for religious purposes, which this Court considers a strong indication of an intent to limit the availability of such property.

In a case directly on point, the Second Circuit stated that "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech. . . ." *Travis*, 927 F.2d at 692. However, the Second Circuit cautioned that once a limited public forum is opened to a particular type of speech, "selectively deny[ing] access for other activities of th[e] same genre" is forbidden. *Id.*

In the case at bar, this Court specifically determined that plaintiffs have not presented sufficient evidence to create a fair ground for litigation as to whether the School District has by practice allowed organizations of similar character to Lamb's Chapel to use its facilities for religious purposes. Moreover, nothing in plaintiff's moving papers persuades the Court to decide otherwise. Because the School District has not, by policy or practice,

opened its doors to groups akin to Lamb's Chapel, this Court holds that the School District's denial of plaintiffs' applications to show the film series is viewpoint-neutral and, hence, constitutional. *See id.* at 694.

CONCLUSION

The Court, having found that no genuine issue exists to be decided at trial, grants defendants' motion for summary judgment. Accordingly, plaintiffs' motion is denied. The Clerk of the Court is directed to close the file in this case.

SO ORDERED.

/s/ Leonard D. Wexler
LEONARD D. WEXLER
United States District Judge

Dated: Hauppauge, New York
July 15, 1991

Addendum

Section 414 of the New York Education Law provides in pertinent part:

> 1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes, or when the school is in use for school purposes . . . for such other public purposes as are herein provided . . .:
>
> (a) For the purpose of instruction in any branch of education, learning or the arts.
>
> (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.
>
> (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.
>
> (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United

States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings.

(f) For civic forums and community centers.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours . . . .

N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1991).

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. NEW YORK

No. CV 90-0500

LAMB'S CHAPEL and JOHN STEIGERWALD,
Plaintiffs,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her Official Capacity as President of the Board of Education for Center Moriches Schools,
Defendants.

May 16, 1990

Migliore & Infranco by Joseph P. Infranco, Commack, N.Y., for plaintiffs.

Dranitzke, Lechtrecker & Trabold by Harold G. Trabold, Patchogue, N.Y., for defendants.

Cynthia Plumb Fletcher, Albany, N.Y., for New York State School Boards Ass'n (amicus).

MEMORANDUM AND ORDER

WEXLER, District Judge.

Plaintiffs Lamb's Chapel and John Steigerwald ("Steigerwald") bring this action for declaratory and injunctive relief against the Center Moriches Union Free School District ("School District") and Louise Tramontano, in her

official capacity as President of the School District's Board of Education (the "Board"), because of defendants' refusal to allow plaintiffs to use the School District's facilities during nonschool hours for the purpose of showing a film series by Dr. James Dobson, entitled "Turn Your Heart Toward Home" (the "film series"). Presently before the Court is plaintiffs' motion for a preliminary injunction to compel defendants to allow plaintiffs to show the film series in the School District's facilities. For the reasons below, the motion is denied.

I. BACKGROUND

The facts as alleged in the complaint and as adduced at the hearing on plaintiffs' motion on March 14, 1990 are as follows: Lamb's Chapel is an evangelical Christian church located in Center Moriches, New York, and incorporated under New York's Not-for-Profit Corporation Law; Steigerwald is its pastor. Since November 1988, on behalf of Lamb's Chapel, Steigerwald has submitted three applications to defendants to use the School District's high school facilities.

The first application, dated November 19, 1988, stated that the purpose for which Lamb's Chapel sought to use the facilities was "to conduct Sunday a.m. service and Sunday School, Nursery, etc." Plaintiff's Exhibit 5a [hereinafter Pl.Ex. #]. According to Steigerwald, this application was rejected because of the religious content of the film series. Subsequently, by the second and third applications, dated December 16, 1988 and October 11, 1989, respectively, plaintiffs sought to use the high school auditorium for one evening for five consecutive weeks to show the film series. For purposes of this action, plaintiffs' conceded at the hearing that the film series is of a religious nature and the showing is for a religious purpose.[1]

[1] In this regard, the October 11 application notes that the film series is a "family oriented movie from a Christian perspective." Pl.Ex. 7a.

Following an initial review of the December 16 application, by letter dated January 18, 1989, Alice Schoener ("Schoener"), the School District's business manager and district clerk, on behalf of the Board, wrote Steigerwald to express the School District's concern that plaintiffs' use of the facilities appeared to be for a religious purpose. The letter indicated that the School District is

> bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> The district has not, in the past, allowed the high school auditorium to be used by any group primarily for its own purposes . . . .
>
> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film). . . . I will be happy to present your request to the Board of Education at our February meeting.

Pl.Ex. 6b. After receiving and reviewing the brochure, Schoener again wrote Steigerwald on behalf of the Board, by letter dated February 8, 1989, to reject the application because the film "appear[ed] to be church related." Pl.Ex. 6d. The third application, substantially similar to the second, was denied on the same basis.

According to defendants, the legal basis for refusing the requests was that use of the facilities for religious purposes would violate § 414 of the New York Education Law[2] and Rule No. 7 of the School District's Rules and

[2] *See* Addendum.

Regulations for Community Use of School Facilities,[3] which govern the use of its facilities.

Plaintiffs argue, however, that during 1987 and 1988 other organizations had been allowed to use the school facilities, and that some had done so for religious purposes.[4] In particular, plaintiffs point to performances by the Salvation Army Youth Band and the Southern Harmonize Gospel Singers, and a lecture series by the Mind Center, purportedly, a New Age religious group.[5] Com-

[3] Rule No. 7 provides that "[t]he school premises shall not be used by any group for religious purposes." Pl.Ex. 5a. The Rules and Regulations further provide that groups requesting to use the school facilities must be predominantly composed of residents and/or students from the school community, though exception is made for outside not-for-profit organizations but only if the applicant demonstrates that there is a benefit to the school community. *Id.*

[4] Plaintiffs list organizations which have been allowed to use the school facilities in the years 1987 and 1988:

A New Age religious group known as the "Mind Center"
Southern Harmonize Gospel Singers
Salvation Army Youth Band
Hampton Council of Churches' Billy Taylor Concert
Center Moriches Co-op Nursery School's Quilting Bee
Manorville Humane Society's Chinese Auction
Moriches Bay Power Squadron
Unkechaug Dance Group
Paul Gibson's Baseball Clinic
Moriches Bay Civic Association
Moriches Chamber of Commerce's Town Fair Day
Center Moriches Drama Club
Center Moriches Music Award Associations' "Amahl & the Night Visitors"
Saint John's Track and Field Program
Girl Scouts of Suffolk County
Cub Scouts Pack 23
Boy Scout Troop #414

Plaintiffs' Brief in Support of Motion for Preliminary Injunction, at 7.

[5] The lecture series was sponsored by the Center Moriches Public Library. The series, entitled "Psychology and the Unknown," was on parapsychology and transpersonal psychology and dealt with eastern mysticism and metaphysics.

plaint para. 18. Because of this practice, plaintiffs contend that they too should be allowed to use the school facilities for religious purposes. Plaintiffs argue that defendants have violated their first and fourteenth amendment rights of freedom of speech, freedom of association and free exercise of religion and their fourteenth amendment right to equal protection. Defendants contend that they may properly refuse to allow any group to use the facilities for religious purposes. In this respect, they maintain that they would not and did not knowingly allow any organization to use the school facilities for religious purposes. In addition, they argue that allowing plaintiffs to use the facilities for religious purposes would violate the Establishment Clause of the first amendment, as well as N.Y.Educ.Law § 414 and the School District's Rule No. 7.

II. DISCUSSION

A. *Preliminary Injunction Standard*

In the Second Circuit, to obtain a preliminary injunction the moving party must show: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir.1988) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979) (per curiam)). The Court therefore turns to evaluate plaintiffs' request under this standard.

B. *Irreparable Harm*

Regarding irreparable harm, plaintiffs contend that denial of the preliminary injunction to use the facilities to show the film series would cause them irreparable harm. This Court agrees. As the Supreme Court has stated, "loss

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); *see also Deeper Life*, 852 F.2d at 679. Accordingly, the Court finds that plaintiffs have demonstrated irreparable harm, and therefore moves on to assess the merits to determine whether plaintiffs have met the second part of the preliminary injunction standard.

C. *The Merits*

As for the second part of the standard, plaintiffs contend that defendants created an "open forum" by allowing a "wide assortment" of groups to use the school facilities, including three groups that used the facilities for "meetings and performances with particular religious messages." Complaint para. 18. As a result, they claim that "this forum cannot be closed to others based on the religious content of their message." *Id.* In opposing the motion, defendants contend that the state, through § 414 and the School District's Rule No. 7, has limited outside organizations' access to the School District's facilities by creating only a "limited public forum," and may legitimately deny access to any group seeking to use the school's facilities for proscribed purposes. As discussed below, this Court finds that plaintiffs have failed to satisfy the second part of the standard.

The Supreme Court has identified three types of forums for purposes of free speech analysis: (1) the traditional public forum; (2) the public forum created by government designation; and (3) the nonpublic forum. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572, 107 S.Ct. 2568, 2570-71, 96 L.Ed.2d 500 (1987) (citing *Perry Educ. Ass'n v. Perry Local Educs.' Ass'n*, 460 U.S. 37, 45-46, 103 S.Ct. 948, 954-56, 74 L.Ed.2d 794 (1983)). Historically, streets and parks have been categorized as traditional public forums. *Perry Educ. Ass'n v.*

Perry Local Educs.' Ass'n, 460 U.S. 37, 45, 103 S.Ct, 948 954-55, 74 L.Ed.2d 794 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963-64, 83 L.Ed.2d 1423 (1939)). In contrast, "[w]hile the citizenry residing within a school district may be the intended users of the forum . . ., public elementary schools are not, as to the general community, traditional public fora." *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d. Cir.1988) (citing *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir.1980), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981)). Nor are the public secondary schools, like the School District's here, traditional public forums. *See Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir.1980), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981).

As for whether public school facilities are public forums, the Supreme Court has held that

> school facilities may be deemed to be public forums only if school authorities have "by policy or practice" opened those facilities for "indiscriminate use by the general public," *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 47 [103 S.Ct. 948, 956, 74 L.Ed.2d 194] (1983), or by some segment of the public, such as student organizations. *Id.*, at 46, n. 7 [103 S.Ct., at 955, n. 7] (citing *Widmar v. Vincent* [, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)]).

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S.Ct. 562, 567-68, 98 L.Ed.2d 592 (1988); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3448-49, 87 L.Ed.2d 567 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."). Based on the record, this Court finds that the School District has not by policy or practice either opened its facilities to indiscriminate use by the

general public or some segment of the public. The school facilities are therefore not public forums. Rather, by enforcing restrictions on access imposed by state statute and by its regulations, the School District has created limited public forums.

Plaintiffs' argument that the defendants have created an "open forum" merely by allowing groups unrelated to the School District to meet there is without merit. The School District has not allowed so-called "unrelated" groups to use its facilities indiscriminately. Instead, the School District has restricted use based on the purpose for which the particular group seeks to use the property. Consequently, an "unrelated" group can use the facilities for a prescribed purpose but not otherwise.

The right to access government property and the standard for evaluating any restrictions varies according to the type of forum involved. *Calash v. City of Bridgeport*, 788 F.2d 80, 83 (2d Cir.1986). In either a traditional public forum or a public forum by government designation, the state may restrict access only by reasonable time, place, and manner regulations which are content-neutral or by content-based prohibitions, narrowly drawn to effectuate a compelling state interest, *Perry Educ. Ass'n*, 460 U.S. at 45-46, 103 S.Ct. at 954-56, whereas in a nonpublic forum, access can be restricted by reasonable and viewpoint-neutral regulations, *Jews for Jesus, Inc.*, 482 U.S. at 573, 107 S.Ct. at 2571; *Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451; *Perry Educ. Ass'n*, 460 U.S. at 49, 103 S.Ct. at 957. As for restricting access in a limited public forum, the Second Circuit explained in *Deeper Life:* "Under the limited public forum analysis, property remains a *nonpublic forum* as to all unspecified uses, and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80 (citations omitted) (emphasis added).

In *Deeper Life*, the Second Circuit reviewed a district court's grant of a preliminary injunction requiring the New York City Board of Education ("NYCBE") to permit a church to conduct religious services in a public school building during non-school hours notwithstanding the provisions of § 414 and a NYCBE regulation excluding fundraising for, teaching the tenets of, or distributing material promoting a particular religion. The Second Circuit stated that critical to determining whether the state has created a limited public forum is the state's interest in establishing the forum. *Id.* at 680 (citing *Calash*, 788 F.2d at 83). With respect to the state's intent, the court noted that under § 414 public school facilities may be used by the general public only for nine enumerated purposes and that use for religious worship and instruction is not one of those purposes. *Id.* (citing *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (4th Dep't 1978)). The court also noted that local school board regulations—such as the NYCBE regulation—are indicative of the state's intent and that such regulations may limit the availability of the forum. *Id.* Lastly, the court noted that § 414 and the New York State Commissioner of Education's interpretations of the statute "demonstrate . . . that access to the school propetry is permitted only where it serves the interests of the public in general, rather than that of sectarian groups," and that "the thrust of the statute is to promote general knowledge, rather than to provide a forum for proselytizing or indoctrinating the public in a particular group's beliefs." *Id.* Notwithstanding that the church was seeking to use the school premises for a purpose arguably outside § 414, the court affirmed the grant of the preliminary injunction because the record showed that the NYCBE had a practice of granting use permits to other religious organizations, thereby creating a fair ground for litigation as to the state's intent in creating the forum. *Id.* at 680-81.

As for the state's intent in creating the forum at issue, as noted in *Deeper Life*, while § 414 lists allowable uses of public school facilities, nowhere does it provide for religious worship or instruction. *Id.* at 680. Moreover, the School District's Rule No. 7, explicitly precluding use of the school facilities for religious purposes, is a strong indication of the state's intent to limit the availability of this particular forum. *See id.* The statute and regulations clearly indicate the state's intent to selectively limit access to the School District's facilities. Based on the record, this Court finds that the School District's facilities are limited public forums. Hence, as to those who would use the facilities for proscribed purposes, in this instance, religious purposes, they are nonpublic forums; and, as such, any exclusion of use must be reasonable and viewpoint-neutral to pass constitutional muster. Accordingly, for plaintiffs to succeed they "must establish that New York's access policy has created a limited public forum intended to benefit" organizations such as Lamb's Chapel and "encompassing the purposes for which the organization seeks to use the school property." *Id.*

Plaintiffs, however, argue that their rights of free speech and association entitle them to access this forum for the purpose they desire. They contend that by creating an "open forum," *i.e.*, a public forum, the School District cannot place content-based restrictions on its use unless the regulations are narrowly drawn to effectuate a compelling state interest. However, as noted above, the evidence indicates that the school facilities are not public forums but rather limited public forums where access can be restricted by reasonable viewpoint-neutral regulations. The focus is not, as plaintiffs argue, on whether defendants have drawn a distinction between religious speech and nonreligious speech, but on whether the exclusion of use based on the purpose for which the group seeks to use the property is reasonable and viewpoint-neutral. Plaintiffs' argument is therefore misplaced.

Further, plaintiffs contend that "Schoener's sole discretion in determining what is or is not overly religious and therefore permissible or not permissible speech, constitutes unconstitutional unbridled discretion on the part of a government official." Complaint para. 22. The plaintiffs, however, did not produce evidence that Schoener made any such determinations. Indeed, Schoener testified that she did not and does not determine if a use would constitute a "religious purpose," and, her letter of January 18, 1989 to Steigerwald indicates no more than that she sought, on behalf of the Board, more information for the Board's determination. Plaintiffs offer no evidence calling into question the reasonableness or propriety of the School District's application review process.

Plaintiffs have not presented sufficient evidence to create a fair ground for litigation as to whether the School District has by practice allowed organizations of similar character to Lamb's Chapel, or, for that matter, any organizations, to use its facilities for religious purposes, thereby opening this forum to plaintiffs. Evidence offered on this point included proof that the Salvation Army Youth Band performed "God Bless America,"[6] Pl.Exs. 11a, 24, and that the Southern Harmonize Gospel Singers sang gospel music, including the song "Amazing Grace." Pl.Exs. 12a, 12b. There was also proof that the Family Counseling Service ("FCS"), affiliated with the Hampton Council of Churches, sponsored a concert by Billy Taylor. Pl.Exs. 9a, 9b. The Director of Development of the FCS, Ruth Bragarnick, testified that the FCS is a partially government-funded, non-profit, non-sectarian organization, and that the concert was to raise funds for counseling services offered by the FCS to communities on eastern

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[6] The performance was part of a joint concert with the Center Moriches High School Band to raise money for a scholarship for a school band member and for sending a needy child to summer camp. The performance of "God Bless America" was, in fact, performed by the combined bands. Pl.Ex. 24.

Long Island. In addition, plaintiffs offered testimony that the lecturer on parapsychology from the Mind Center, Jerry Huck ("Huck"), discussed, among other things, spiritual growth, channeling, out-of-body experiences, and kundalini and the centers of the body, and referred to God and Jesus Christ at some point in his lecture. Huck, however, testified that his lectures involved scientific topics only, based on such things as analytic and quantum physics. And the application submitted by the Center Moriches Public Library for the lecture series specified that the purpose of the lectures was "Educational." Pl. Ex. 16. Upon review of the record, this Court finds that plaintiffs have not sufficiently shown that defendants have a practice of permitting use by any organization for religious purposes.

Plaintiffs also argue that defendants have violated their rights to equal protection by imposing a content-based restriction in a public forum. Plaintiffs contend that strict scrutiny analysis should be applied since defendants base the exclusion on a suspect classification (religion), infringing on fundamental rights (freedom of speech, freedom of association, and free exercise of religion). This argument is without merit for two reasons. First, as noted above, the school facilities are not public forums. And second, more importantly, as noted above, the evidence shows that all organizations have been equally prohibited from using the facilities for religious purposes. *See Brandon*, 635 F.2d at 980 ("[S]ince all religious groups are equally denied access, any equal protection argument lacks merit.")

It is also clear that plaintiffs cannot base their right to access on their constitutional right to free exercise of religion since this is neither a situation where the state has asserted coercive restraints on religious observation nor a situation where special circumstances require the state to accommodate the plaintiffs' religious needs. *See id.* at 976-78.

Nor can plaintiffs base their right to access on the Supreme Court's decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and the Establishment Clause. Plaintiffs argue that religious use of the School District's open forum is required by *Widmar*, and that the Establishment Clause does not justify banning religious speakers from an open forum under the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971),[7] because the "School District's policy and actions have the 'primary effect' of advancing nonreligion and inhibiting religion," and the "government does not show neutrality towards religion with its hostile act of banning all religious expression from an open forum." Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, at 12-15, 22-23. This Court does not agree with either argument. Again, plaintiffs premise their arguments on their mistaken view that the school facilities are public forums as defined by the Supreme Court in *Hazelwood School District*, *supra*. Further, plaintiffs ignore the Second Circuit's view that *Widmar* does not control in this type of situation.[8]

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[7] Under this three-prong test, a governmental policy will not offend the Establishment Clause if: (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

[8] In *Deeper Life* the Second Circuit stated:

> *Widmar*, however, does not control the result here. As the Supreme Court pointed out in a later case, in *Widmar* it had "noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum," thereby subjecting attempts at regulating use to the most exacting constitutional standards as to the forum's intended beneficiaries.

Deeper Life, 852 F.2d at 679 (quoting *Cornelius*, 473 U.S. at 803, 105 S.Ct. at 3449-50). The court instead chose to apply what it termed a "limited public forum analysis," as discussed previously.

The Constitution does not require a public school district to open its school buildings to indiscriminate use where the state has by policy and practice circumscribed availability through reasonable and viewpoint-neutral regulations. Plaintiffs have not sufficiently shown that the situation is otherwise so as to justify the preliminary injunction.

CONCLUSION

Based on the reasons above, since plaintiffs have not shown either a substantial likelihood of success on the merits or sufficiently serious questions going to the merits, their request for a preliminary injunction is denied.

SO ORDERED.

ADDENDUM

New York Education Law § 414 provides in pertinent part:

> 1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. . . . Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:
>
> (a) For the purpose of instruction in any branch of education, learning or the arts.
>
> (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.
>
> (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.
>
> (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be extended for an educational or

charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil [sic] forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for the conduct and supervision, provided that nothing herein contained

shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during nonschool hours, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

N.Y.Educ.Law § 414 (McKinney 1988 & Supp.1990).

APPENDIX D

N.Y. Educ. Law § 414

(McKinney 1988 & Supp. 1992)

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret, or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance

principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section.

APPENDIX E

RULES AND REGULATIONS FOR COMMUNITY USE OF SCHOOL FACILITIES

Groups requesting use of school facilities must be predominantly composed of residents and/or students from the Center Moriches school community. Outside non-for-profit organizations may request the use of a facility but approval will be granted only if it can be clearly demonstrated that there is a benefit to the Center Moriches school community.

1. An application for use of the school premises is to be secured from the district office. Said application must be completed and returned for subsequent approval or disapproval. On approval, a copy will be returned to the applicant.
2. The applicant will not be admitted to the premises prior to the time stipulated on the application, and every effort should be made to vacate the premises at the time stipulated in the application.
3. There shall be no gambling or use of intoxicating beverages at any time on the school premises.
4. If refreshments are to be served, all details must be stated in the application and the administration reserves the right to designate the area.
5. Applicants are responsible for any damage to school property.
6. Applicants are responsible for injury or liability incurred. The Board of Education may require the applicant to furnish a certificate of Insurance in accordance with the following:
   a. The Insurance carrier must be licensed by the NYS Insurance Dept. to conduct business in New York.
   b. The interests of the CMUFSD are to be included as an additional Insured; and such inclusion is to be evidenced by signed, original endorsement.

   c. Certificates are required on company imprinted stationery. "Acord" or other blank certificates are not acceptable. In the absence of company imprinted stationery, a letter of transmittal from the insurance company, signed by an authorized representative, will be acceptable.
   d. Limits of liability: Comprehensive general liability including products liability if applicable. $500,000 to $1,000,000 bodily injury and $50,000 property damage.
7. The school premises shall not be used by any group for religious purposes.
8. The use of the premises by political organizations must be secured in compliance with Section 414 of the Education Law of the State of New York.
9. A permit will not be issued for personal or private gain, financial or otherwise.
10. A permit for a social, civic, or recreational use shall be approved only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event.
11. For an event where admission fees are charged, the proceeds must, by State law, be expended for an educational or charitable purpose.
12. Applicants are responsible for providing adequate supervision for all events in order to insure the proper conduct and discipline of such activity. A list of chaperones may be required to be submitted with the application.
13. For any activity involving school age children, a minimum of two adult supervisors must be present. Additional supervisors are to be provided for activities with large participation.

14. Only those facilities and items requested and approved may be used by the applicant.

15. The School District reserves the right to impose a charge for the use of the premises, according to the services rendered. Where special custodial or cleaning is required, fees will be imposed. A minimum fee will be collectible in advance. Additional charges will be billed as required.

16. The School District reserves the right to require its custodians to be on duty during the use of the facility by the applicant.

17. Smoking will be permitted only in the designated smoking areas.

18. No permit is valid unless signed by the authorized administrator.

19. The approved permit must be exhibited upon request to any representative, staff member or official of the School District.

20. The applicant's equipment and materials must be removed from the building promptly after its use so as not to interfere with school activities.

21. The permit is valid only for the time and purpose specified in the application. A new application must be filed at the beginning of each school year.

22. A permit is not transferable.

23. The school administration and the Board of Education may cancel any activity when the school facility is required for a school-sponsored event.

24. In order to insure the equitable use of school facilities for community use, all approved applications are subject to rescheduling and/or cancellation by the school administration.

25. It is the responsibility of the applicant to see that the facilities used are left in a clean and orderly condition and all waste materials deposited in the proper receptacle.

26. It will be the responsibility of the groups who have secured a permit for a scheduled use of the school facilities to inform the School District if the scheduled use will be changed or cancelled.

27. A permit that has been issued may be cancelled and future applications denied if the applicant fails to comply with the foregoing rules and regulations.

28. The School District has the right to prohibit any proposed activity which might be deemed detrimental to the best interests of the School District.

These regulations have been established in conformance with the intent as stated in Section 414 of the Education Law of the State of New York. In addition to this, all Federal and State Laws, Local Ordinances, and rules of the Police and Fire Departments regarding public assemblies must be strictly obeyed .